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ABDUL RAHMAN USOF & ORS v. RHB TRUSTEES BHD

HIGH COURT MALAYA, KUALA LUMPUR
GAN TECHIONG JC
[ORIGINATING SUMMONS NO: WA-24NCvC-2583-07-2024]
28 APRIL 2025

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Abstract – *A trustee must always act honestly, prudently, and in the best interests of the beneficiaries. Even if the trust deed grants the trustee the power to sell trust properties to raise funds, that power is not unfettered. The trustee must not enter into any agreement or scheme with dubious terms that could harm the beneficiaries, as they owe a strict fiduciary duty to protect the trust and its beneficiaries.*

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TRUSTS: *Duties – Fiduciary duty – Breach of – Trustee appointed property agent to sell trust properties on dubious terms and conditions – Trustee agreed to pay property agent massive amount as 'upgrade and renovation costs' – Trustee allowed property agent to claim commission as much as 3% of full purchase price of trust properties – Trustee ignored queries from beneficiaries regarding sale of trust properties – Whether trustee acted with serious lack of probity – Whether trustee breached fiduciary duties to beneficiaries – Whether court order allowing trustee to sell trust properties ought to be set aside*

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The applicants were aborigines from the Jakun tribe, a tribe that received a windfall when their ancestral land was acquired by the State Government of Johor in the 1990s. Pursuant to that acquisition, the Jakun tribe was awarded a land acquisition compensation of more than RM38 million. From that amount, RM22 million was used to establish a trust for the benefit of the Jakun tribe, known as the Linggiu Valley Orang Asli (Jakuns) Trust ('trust'). The respondent, RHB Trustees Bhd, was the current and sole trustee of the trust. The trust subsequently owned 57 condominium units in Kuala Lumpur ('condominiums'). Upon learning that the respondent intended to sell the condominiums for the purpose of raising trust funds, the applicants made inquiries with the respondent regarding the matter. However, as the respondent failed to render the trust's statement of accounts and ignored numerous letters from the applicants' solicitors, the applicants filed an application before this court. The respondent was then ordered to furnish accounts and make payments to the applicants. Subsequently, upon an application by the applicants for a discovery order, the respondent was ordered to provide a copy of each sale and purchase agreement it had executed for the sale of some of the condominiums. Pursuant to this, it was discovered that: (i) the respondent had obtained an *ex parte* order on 20 June 2023 for the sale of the condominiums ('impugned order'); (ii) the respondent had adduced a valuation report showing that the market value of the condominiums was RM17,120,000, while their forced sale value was

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RM11,984,000. However, the applicants later discovered that, based on the sale transactions of two nearby developments, the actual market value of the condominiums exceeded RM19,000,000; (iii) the respondent had appointed only one property agent ('property agent') as the sole agent to sell all the condominiums, on dubious terms and conditions; and (iv) the respondent had agreed to pay the property agent a substantial portion of the sale proceeds, amounting to RM7,624,247.45. In the property agent's letter, this payment was described as 'upgrade and renovation costs' ('scheme'). The applicants strongly objected to the scheme, contending that it would result in the payment of more than RM7.6 million out of the trust's assets to the property agent. The applicants alleged, *inter alia*, that the respondent had breached its fiduciary duties by: (i) failing to obtain the beneficiaries' consent to sell the condominiums; (ii) agreeing to pay more than RM7.6 million to the property agent; (iii) concealing the proposed sale; and (iv) acting negligently and failing to respond to the applicants' repeated queries. Hence, the present application by the applicants to set aside the impugned order.

Held (allowing application):

(1) The fact that the 'upgrade and renovation costs' to be paid to the property agent amounted to a whopping RM7,624,347.45 was shocking. Over and above that massive amount, the respondent also agreed to pay the property agent a commission as high as three percent of the total sale price of all the condominiums. Judicial notice was taken that a commission rate of three percent of the sale price was higher than the market rate. The maximum commission that property agents in Malaysia were allowed to charge was three percent of the sale price, while the minimum was a flat rate of RM1,000 per property. In this case, the respondent had agreed to pay the maximum rate of commission to a single property agent who had been given exclusive rights to sell all the condominiums, and the property agent was also promised more than RM7.6 million as 'upgrade and renovation costs'. The respondent had acted to the detriment of the applicants, thus proving the respondent's lack of probity as a trustee. (paras 24 & 27-29)

(2) The valuation report adduced by the respondent which showed the condominiums were worth more than RM17 million, was based on their existing condition, that did not require any renovation. Assuming there was a real need to sell the condominiums, there was no evidence that the respondent had expended any efforts to sell the same, at least at the market price of RM17,120,000 as valued in the valuation report. The respondent appeared to have hurried along with its scheme to sell the condominiums at a dubious term of paying the 'upgrade and renovations costs' of over RM7.6 million to the property agent – without requiring the property agent to give any details regarding the 'upgrade and renovation' that was required to be performed. This further proved the respondent's lack of probity as a trustee. (paras 30-32).

(3) The absurdity of the respondent's agreement to pay the 'upgrade and renovation costs' was best illustrated by the figures shown in the computation marked as annexure A to the property agent's letter. One of the figures pertained to the sale of unit E-20-2 of the condominiums. It showed that the purchaser was to pay the market price of RM404,993.39 for the said unit, but the trust would receive only RM263,328.92, as another RM141,664.46 represented the so-called 'upgrade and renovation costs' payable to the property agent. The trust would receive even less for the said unit because the respondent had also agreed to allow the property agent to take three percent of the full purchase price. The amount of RM263,328.92 had yet to consider the legal fees payable for the sale of the said unit. (paras 33 & 34)

(4) Although the respondent had filed an *ex parte* application to amend the impugned order and to remove the property agent's name after the filing of the present application, the respondent's credibility as a professional trustee of the trust had been irreversibly damaged. This was due to the actions of two senior employees of the respondent who had knowingly signed the property agent's letter to signify the respondent's unequivocal acceptance of its terms, which included the payment of 'upgrade and renovation costs'. This agreement was wholly unjustifiable and demonstrated a clear intention to deplete the assets of the trust. It constituted a breach of the respondent's fiduciary duty to protect the trust. (paras 38 & 39)

(5) As the impugned order had been obtained by way of an *ex parte* application, it could be set aside pursuant to O. 32 r. 6 of the Rules of Court 2012 ('ROC'). Order 42 r. 3 of the ROC was inapplicable in this case to limit the time for the applicants to apply to set aside the impugned order, as it had never been served on them. Upon conducting a file search, the applicants' solicitors had lost no time in filing the present application. Moreover, by applying the *ratio* in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* and *PECD Bhd & Anor v. AmTrustee Bhd & Other Appeals*, it was found that the respondent, through its senior employees, had acted in breach of its fiduciary duties in the management of the condominiums and in attempting to use the impugned order to ratify those breaches. It was clear that the impugned order (and its amended version) should be set aside. (paras 41-45)

(6) While cl. 7.3 of the deed of trust did state that the trustee was empowered to sell the trust properties, that power was not unfettered. That clause must be read with the trite principle that a trustee is a fiduciary who must always act in the best interest of the beneficiaries. As the respondent had acted with a serious lack of probity, it was not open to the respondent to callously point its finger at cl. 7.3 and claim to have unfettered power to sell the trust properties at a great loss to the beneficiaries of the trust. (para 50)

(7) Consequential orders were necessary since the scheme had demonstrated that the respondent could not be trusted to sell the condominiums by way of private treaty or through any property agent. Moving forward, the court had ordered that any sale of the condominiums be conducted by way of public auction or open tender at market price, under the supervision of solicitors and a property valuer, with the assistance of licensed estate agents to market the properties. This was to ensure transparency and to secure the best possible sale price for the benefit of the beneficiaries. (para 52)

Case(s) referred to:

Cheah Wong Nyan And Cheah Sin Kee v. Kalrm Palaniappa & Ors [1934] CLJU 10; [1934] 1 LNS 10 HC ***(refd)***

Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd [2016] 2 CLJ 717 FC ***(refd)***

PECD Bhd & Anor v. AmTrustee Bhd & Other Appeals [2010] 1 CLJ 940 CA ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 20 r. 11, O. 32 r. 6, O. 42 r. 13

For the applicants - Rabia Abd Halim & Siti Zabedah Kasim; M/s Rabia, Farihan & Sures
For the respondent - Kenneth Koh, Afiq Iskandar & Moo Jie Ying (PDK); M/s Xavier & Koh Partnership

Reported by Syamim Ariffin

JUDGMENT

Gan Techiong JC:

Introduction

[1] In Malaysia, we call our aborigines "Orang Asli", which is an apt nomenclature as it means "original people". There is a long and chequered history behind this case which was filed by 65 'Orang Asli' who are beneficiaries of a trust. Their tribe, which is part of the Jakun tribe, 'came into big money' about three decades ago. More facts, as are necessary for the determination of this action, shall be elucidated below.

[2] Those 65 'Orang Asli' commenced this action to protect their interest upon discovering that the trustee of the trust has agreed to highly abnormal terms and conditions for the sale of trust properties. The trustee is RHB Trustees Berhad, whom they have rightly named as the respondent herein.

[3] Various allegations are averred in the applicants' supporting affidavit affirmed by the sixth plaintiff, Jasni bin Amat on behalf of the applicants; the most glaring one being a proposed sale of 57 condominiums held by the

A trust with an absurd condition that a property agent appointed by the respondent shall be receiving about RM7.6 million out of the sale proceeds, purportedly as "upgrade and renovation costs".

[4] After reading the cause papers and hearing submissions by both counsel, I decided that this court ought to rule in favour of the applicants/ B 'Orang Asli'. My reasons for allowing the applicants' application are as explained below.

Background Facts

[5] The 65 applicants in this action are 'Orang Asli' of the Jakun tribe C who are beneficiaries of a trust known as the Linggiu Valley Orang Asli (Jakuns) Trust ("the trust").

[6] There were earlier trustees appointed for the trust but for the purpose of this case, only the conduct of the respondent RHB Trustees Berhad is relevant. The respondent was appointed *vide* a court order dated 10 March D 2019 to be the trustee of the trust.

[7] The applicants had a windfall in the 1990's when their ancestral land was acquired by the State Government of Johor and an award of RM26 million was made by the court then.

E **[8]** By the time the land acquisition award was affirmed after appeals, the sum received in year 2000 was more than RM38 million, including interest on the principal sum. After payment of legal fees and some initial distribution to the 'Orang Asli', the trust was set up with a balance sum of RM22 million.

F **[9]** There has been litigation over the past years involving past trustees and solicitors, creating a chequered history for the trust. The factual matrix as to how the trust ended up having 57 condominiums in Kuala Lumpur is irrelevant in this case. Here, it is sufficient just to mention that 53 units of those condominiums are in the development known as Lanai Gurney G Corporate Suites and four units are within Gurney Heights, both of which are located in Mukim Setapak, Kuala Lumpur ("the 57 condos").

[10] The respondent had failed to render statements of accounts regularly to the applicants, ignoring numerous letters sent by the applicants' solicitors, which led to the applicants filing an action against the respondent in H September 2022. In that civil suit, Roz Mawar Rozain JC (as Her Ladyship then was) ordered the respondent to furnish accounts and make payments. It is unnecessary here to delve into the details of the previous civil suit, save to note that the applicants had encountered difficulties earlier in obtaining information from the respondent about the trust accounts, *etcetera*.

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[11] On 7 January 2025, this court issued a discovery order upon the application of the applicants to require the respondent to provide a copy each of the sale and purchase agreements that the respondent had entered into for the sale of some of the 57 condos. The respondent has complied with the discovery order.

The Applicants' Claim

[12] The applicants aver that the respondent had acted dishonestly towards them ("tidak berkelakuan jujur kepada kami") as they heard that the respondent was attempting to sell all the 57 condos without informing them. According to the applicants, their solicitors Messrs Rabia, Farihan & Sures did a file search in court and discovered that the respondent had obtained an *ex parte* order for sale on 20 June 2023 *vide* an *ex parte* originating summons at the High Court at Kuala Lumpur OS No. WA-24NCvC-1904-05-2023 ("OS No. 1904").

[13] It was further highlighted by the applicants that they also discovered that the respondent had adduced a valuation report which shows the market price of the 57 condos to be RM17,120,000 and the force sale price to be RM11,984,000.

[14] Learned counsel for the applicants contends that the market valuation of RM17 million and force sale price of RM12 million were gross undervaluation of the 57 condos which are located within the city of Kuala Lumpur. They also averred that based on the sale transactions in the two developments where the 57 condos are located, as shown in a Brickz report, the market value of the 57 condos are higher than RM19 million.

[15] It was also highlighted in the submissions of learned counsel for the applicants that the respondent had appointed only one property agent, namely Jeffrey Brandon Property ("the property agent"), to be the sole agent to sell all the 57 condos at the market price but with dubious terms and conditions, including the payment of a large percentage of the selling price to the property agent. The payment was stated as "upgrade and renovation costs" in the property agent's letter dated 15 December 2023 ("the property agent's letter").

[16] On 26 January 2024, two senior employees of the respondent signed at the bottom of the property agent's letter to confirm the appointment of the property agent (Jeffrey Brandon Property) and accepted the terms and conditions stated in the said letter.

[17] The monies to be paid to the property agent, as stated in the property agent's letter dated 15 December 2023 as "upgrade and renovation costs", added up to a whopping RM7,624,347.45.

[18] In the *ex parte* order for sale dated 20 June 2023 in OS No. 1904 ("the impugned order"), it was stated as "kerja-kerja pembaikan dan penyelenggaraan" (which English translation should be repair and maintenance works) to be done in the 57 condos.

[19] The applicants strongly objected to the scheme which would result in the payment of more than RM7.6 million out of the trust's assets to the property agent. They alleged, *inter alia*, breach of fiduciary duties by the respondent in failing to obtain the beneficiaries' consent to sell all the 57 condos, agreeing to pay more than RM7.6 million to the property agent, concealing the proposed sale, being negligent in its conduct and for refusing (earlier) to respond to repeated queries raised by the applicants who are beneficiaries of the trust.

The Defendant's Position

[20] Learned counsel for the defendant submitted that the deed of trust dated 5 June 2000 gives the respondent a free hand to sell the assets comprising the whole or any part of the trust fund. Reference was made to cl. 7.3 which reads:

> Of the powers of the authorities and discretions conferred by law, the Trustees shall have the following powers, authorities and discretions vested in it by any other provisions of this Deed, or by law authorized:
>
> (a) Generally deal with trust fund: to sell, call in and convert into money, grant options or rights to purchase or otherwise deal with, dispose of, or transfer any item or assets comprising the whole or any part of the trust fund or otherwise held by the trustees under the terms of the Trust for such consideration and on such terms as in their discretion they deem fit.

[21] It was further submitted that the respondent wanted to liquidate the 57 condos in order to raise money to make distribution to the beneficiaries but was unable to sell the 57 condos.

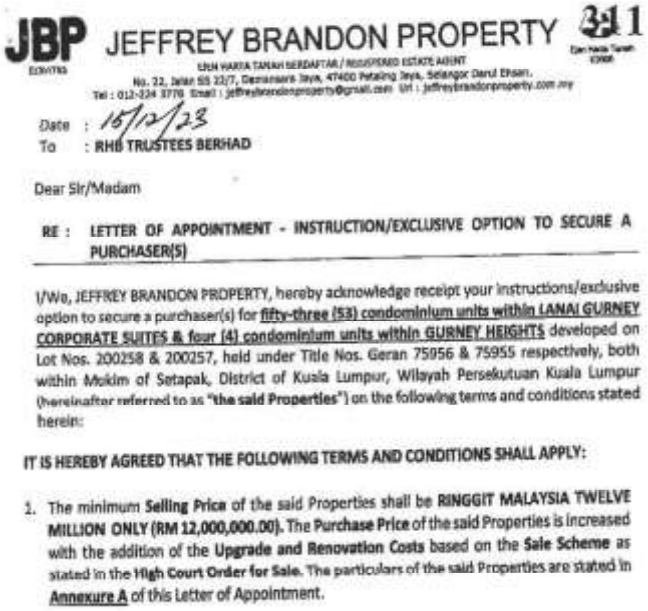
[22] As for the appointment of the property agent to sell the 57 condos, it was submitted that the respondent had subsequently revoked the appointment and had on 11 November 2024 obtained an *ex parte* order, *inter alia*, to amend the impugned order and deleted the property agent's name therefrom.

[23] The gist of the respondent's position is that the respondent ought to be allowed to proceed based on the amended impugned order, and the applicants may sue the respondent for breach of trust thereafter.

Analysis Of The Facts And Law

[24] After poring through the affidavits and submissions of learned counsel on both sides, I find evidence of serious lack of probity on the part of the respondent which is the sole trustee of the trust.

[25] As pointed above, the property agent's letter was dated 15 December 2023, and two senior employees of the respondent signed at the bottom of it to confirm the appointment of the property agent in January 2024. Screenshots of relevant portions of the property agent's letter are pasted below:



JBP JEFFREY BRANDON PROPERTY

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EJEN HARTA TANAH BERDAFTAR / REGISTERED ESTATE AGENT

No. 22, Jalan SS 22/7, Damansara Jaya, 47400 Petaling Jaya, Selangor Darul Ehsan.

Tel : 012-324 3776 Email : jeffreybrandonproperty@gmail.com Url : jeffreybrandonproperty.com.my

Date : 15/12/23

To : RHB TRUSTEES BERHAD

Dear Sir/Madam

RE : LETTER OF APPOINTMENT - INSTRUCTION/EXCLUSIVE OPTION TO SECURE A PURCHASER(S)

I/We, JEFFREY BRANDON PROPERTY, hereby acknowledge receipt your instructions/exclusive option to secure a purchaser(s) for **fifty-three (53) condominium units within LANAI GURNEY CORPORATE SUITES & four (4) condominium units within GURNEY HEIGHTS** developed on Lot Nos. 200258 & 200257, held under Title Nos. Geran 75956 & 75955 respectively, both within Mukim of Setapak, District of Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur (hereinafter referred to as **"the said Properties"**) on the following terms and conditions stated herein:

IT IS HEREBY AGREED THAT THE FOLLOWING TERMS AND CONDITIONS SHALL APPLY:

1. The minimum **Selling Price** of the said Properties shall be **RINGGIT MALAYSIA TWELVE MILLION ONLY (RM 12,000,000.00).** The **Purchase Price** of the said Properties is increased with the addition of the **Upgrade and Renovation Costs** based on the **Sale Scheme** as stated in the **High Court Order for Sale.** The particulars of the said Properties are stated in **Annexure A** of this Letter of Appointment.

[26] However, I note that the impugned order dated 20 June 2023 had already stated the name of the property agent, *ie*, Jeffrey Brandon Property, in para. (e) therein, and to be authorised to receive money for "kerja-kerja pembaikan dan penyelenggaraan". This is evidence that the respondent had in fact planned the scheme much earlier for the property agent to be receiving a large percentage of the future sale proceeds. It was not a case of the respondent seeking prior approval from the court to sell the 57 condos at market price and thereafter to choose and appoint property agents to seek purchasers to buy at the market price.

[27] The fact that the "upgrade and renovation costs", stated in the property agent's letter to be paid to the property agent added up to a whopping RM7,624,347.45 is shocking.

[28] Over and above the massive "upgrade and renovation costs" of RM7,624,347.45 which the respondent had agreed to be paid to the property agent, the respondent also agreed that the property agent would be paid a commission as high as three percent (3%) of the total sale price of all the 57 condos. This may be seen from the screenshot of the relevant part of the property agent's letter, as follows:

"Agency's Commission"	means three (3%) per centum of the Purchase Price (excluding 6% SST) in accordance with the Valuers, Appraisers and Estate Agents Act 1981.

[29] With respect, this court takes judicial notice that a rate of three percent (3%) of the sale price is higher than the market rate. 3% is in fact the maximum commission that property agents in Malaysia are allowed to charge. In fact, property agents in Malaysia are allowed to charge a flat rate of only RM1,000 per property. This information is the official portal of the Board of Valuers, Appraisers, Estate Agents and Property Managers of Malaysia, *ie*, in the public domain (see https://lpeph.gov.my/fees). Here, the respondent had agreed to pay the maximum rate of commission to a single property agent who is being given exclusive rights to sell as many as 57 condominiums and who is also promised to receive more than RM7.6 million as "upgrade and renovation costs". The respondent was acting to the detriment of the beneficiaries of the trust.

[30] Reverting to the massive "upgrade and renovation costs" of RM7,624,347.45 which the respondent had agreed to be paid to the property agent, the following facts further proved the lack of probity on the part of the respondent as trustee.

[31] First, the property valuation report prepared by Messrs Jordan Lee & Jaafar, which shows the 57 condos to be worth more than RM17 million, was based on their existing condition, meaning no renovation was required. The valuer clearly stated "in its existing condition", *ie*, without having to do any repairs or renovation. A screenshot of the relevant part of the valuation report that shows the valuation of over RM17 million is pasted below:

> Taking into consideration all relevant factors, we are of the opinion that the present Aggregate Market Value of the Premises, as a bulk unit/ single-entity, being 53 condominium units within Lanai Gurney Corporate Suites and 4 condominium units within Gurney Heights Condominium, held under the respective strata titles as tabulated under Schedule I, all developed on Lot Nos. 200258 & 200257, held under Title Nos. Geran 75956 & 75955, both within Mukim of Setapak, District of Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, together with the other improvements therein, bearing postal address, (The respective Unit Nos.), Lanai Gurney Corporate Suites/Gurney Heights Condominium, Jalan Bukit Keramat, 54000 Kuala Lumpur, in its existing condition, free from all encumbrances and with vacant possession is RM17,120,000/- (RINGGIT MALAYSIA: SEVENTEEN MILLION ONE HUNDRED AND TWENTY THOUSAND ONLY).

[32] Assuming that there is a real need to sell the 57 condos, there is no evidence of the respondent having made any efforts to sell the 57 condos, at least at the market price of RM17,120,000 as valued by Messrs Jordan Lee & Jaafar. The respondent appeared to have hurried along with its scheme to

sell the 57 condos which included a dubious term to pay "upgrade and renovation costs" of over RM7.6 million to the property agent – without requiring the property agent to give any details whatever of "upgrade and renovation" that are to be performed.

[33] The absurdity of the respondent's agreeing to pay "upgrade and renovation cost" to the property agent is best illustrated by the figures shown in the computation marked as annexure A of the property agent's letter. I shall refer to two examples out of the 57 condos to highlight the figures. A screenshot of the unit E-20-2 in item No. 21 of annexure A is pasted below:

ANNEXURE A

LANAI GURNEY CORPORATE SUITES

NO.	UNIT NO.	PURCHASE PRICE (JBP)	SELLING PRICE (RHBT)	UPGRADE & RENOVATION COST
21	E-20-2	404,993.39	263,328.92	141,664.46

[34] The above screenshot for unit E-20-2 in item no. 21 of annexure A shows that the purchaser shall pay the market price of RM404,993.39 (as valued by the valuer) but the trust shall only be receiving RM263,328.92 because RM141,664.46 is the so-called "upgrade and renovation cost" to be paid to the property agent. The trust will actually receive less than RM263,328.92 for this unit because as highlighted in para. 28 above, the respondent has also agreed to allow the property agent to take 3% of the full purchase price of RM404,993.39, and there would be legal fees payable as well for the sale of this unit E-20-2.

[35] There is no doubt that the actual sale price is RM404,993.39 (as valued by the valuer) because there is evidence from the sale document signed between the respondent (as vendor) and the purchaser for this unit E-20-2. A screenshot of it is pasted below:

JB JEFFREY BRANDON PROPERTY

EJEN HARTA TANAH BERDAFTAR / REGISTERED ESTATE AGENT

No. 58, Jalan Ketiling, Taman Canning, 31400 Ipoh, Perak Darul Ridzuan

Date : 15/5/2023

To : NUR SAGILAH BINTI AHMAD TMIDDIN

Dear Sir/Madam

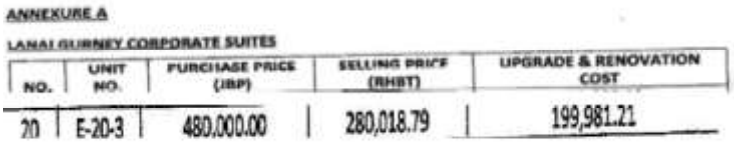
Re : Offer to purchase for property known as E-20-2 LANAI GURNEY CORPORAT SUITES, JLN BWKT KERAMAT, KAMPUNG DATUK KERAMAT, 54300 KUALA LUMPUR

OFFER TO PURCHASE

We, Jeffrey Brandon Property, hereby receive your offer to purchase the above property based on the following terms and conditions:-

1) Purchase price of the property is RM 404,993 free from all encumbrances.
2) A total of 10 (%) of the purchase price will be paid upon signing of the Sale & Purchase Agreement (SPA).
3) The balance of 90 % of the purchase price will be paid within 3 months from date of signing SPA or date of consent to transfer by the relevant authority (if any) whichever is later, with an additional grace period of 1 month(s) carrying an interest at 10% per annum on amount outstanding calculated on a daily basis.

[36] Similarly, for the sale of a unit known as E-20-3, the respondent had agreed to enrich the property agent at the expense of the trust. A screenshot pasted below of the relevant part of annexure A (part of the property agent's letter agreed to by the respondent) shows actual sale price of RM480,000 but with the trust to be receiving only RM280,018.79 because the respondent has agreed for the property agent to be paid as much as RM199,981.21 as "upgrade and renovation cost".

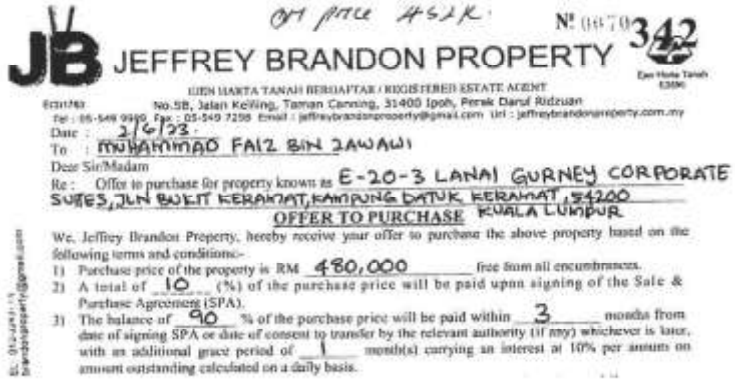


ANNEXURE A

LANAI GURNEY CORPORATE SUITES

NO.	UNIT NO.	PURCHASE PRICE (JBP)	SELLING PRICE (RHBT)	UPGRADE & RENOVATION COST
20	E-20-3	480,000.00	280,018.79	199,981.21

[37] Evidence that the sale price agreed to be paid by the purchaser is RM480,000 can be seen from the following screenshot of the sale document signed by the purchaser of unit E-20-3. Yet, the respondent had agreed for the trust to be receiving only RM280,018.79 and for the property agent to be paid RM199,981.21 as "upgrade and renovation cost".



JB JEFFREY BRANDON PROPERTY

EIEN HARTA TANAH BERDAFTAR / REGISTERED ESTATE AGENT

No.5B, Jalan Kelling, Taman Canning, 31400 Ipoh, Perak Darul Ridzuan

Date : 2/6/23

To : MUHAMMAD FAIZ BIN ZAWAWI

Dear Sir/Madam

Re : Offer to purchase for property known as E-20-3 LANAI GURNEY CORPORATE SUITES, JLN BUKIT KERAMAT, KAMPUNG DATUK KERAMAT, 54200 KUALA LUMPUR

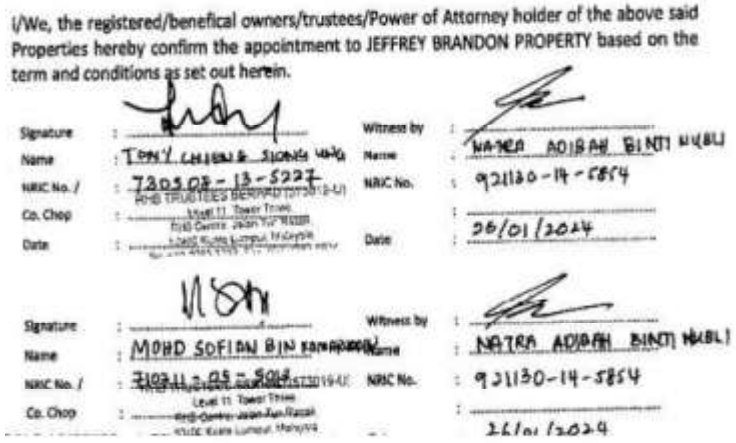
OFFER TO PURCHASE

We, Jeffrey Brandon Property, hereby receive your offer to purchase the above property based on the following terms and conditions:-

1) Purchase price of the property is RM 480,000 free from all encumbrances.
2) A total of 10 (%) of the purchase price will be paid upon signing of the Sale & Purchase Agreement (SPA).
3) The balance of 90 % of the purchase price will be paid within 3 months from date of signing SPA or date of consent to transfer by the relevant authority (if any) whichever is later, with an additional grace period of 1 month(s) carrying an interest at 10% per annum on amount outstanding calculated on a daily basis.

[38] Even though the respondent had subsequently filed an *ex parte* application to amend the impugned order and to remove the property agent's name after this action was filed by the applicants (who are the beneficiaries), the respondent's credibility as professional trustee for the trust has been irreversibly damaged. This is due to the act of the two senior employees of the respondent who knowingly signed at the bottom of the property agent's letter to signify the respondent's unequivocal acceptance of the terms – which included the paying of "upgrade and renovation costs" which added up to RM7,624,347.45.

[39] The said term to agree to pay the property agent such a massive,sum was wholly unjustifiable and pointed to a clear intention to deplete the assets of the trust. It was a breach of the respondent's fiduciary duty to protect the trust. There is no room for the respondent to deny because the signatures and rubber stamp of the respondent's senior employees are imprinted at the bottom of the property agent's letter, as shown in the screenshot below:


I/We, the registered/benefical owners/trustees/Power of Attorney holder of the above said Properties hereby confirm the appointment to JEFFREY BRANDON PROPERTY based on the term and conditions as set out herein.

Signature : ..... Witness by : .....
Name : TONY CHIEW & SIONG HUA Name : NATRA ADIBAH BINTI HUBLI
NRIC No. / : 730508-13-5227 NRIC No. : 921130-14-5854
Co. Chop : ..... : .....
Date : ..... Date : 26/01/2024

Signature : ..... Witness by : .....
Name : MOHD SOFIAN BIN [illegible] Name : NATRA ADIBAH BINTI HUBLI
NRIC No. / : [illegible] NRIC No. : 921130-14-5854
Co. Chop : ..... : .....
26/01/2024

[40] From a reading of the impugned order dated 20 June 2023 and annexure A of the property agent's letter, I reiterate my finding that the respondent had planned it from the outset to appoint the property agent and to pay him a large percentage of the actual sale price purportedly as "upgrade and renovation costs". The screenshot of the relevant part of the impugned order states:

DI HADAPAN HAKIM	DALAM KAMAR
NIK HASMAT BINTI NIK MOHAMAD	MELALUI PLATFORM
PAPA 20 JUN 2023	SIDANG VIDEO SECARA ZOOM

PERINTAH
(Lampiran 1)

ATAS PERMOHONAN Pemohon yang dinamakan di atas yang ditetapkan untuk pendengaran pada hari ini DAN SETELAH MEMBACA Saman Pemula (*ex parte*) bertarikh 23 Mei 2023 dan Afidavit-Afidavit yang kesemuanya difailkan di sini DAN

SETELAH MENDENGAR Erica Sree peguamcara bagi pihak Pemohon MAKA ADALAH DIPERINTAHKAN bahawa:

(e) Jumlah lebihan harga jual yang dipersetujui bagi Kesemua 57 Unit Kondominium tersebut adalah untuk menampung kos Kerja-kerja Pembaikian dan Penyelenggaraan tersebut dan akan di keluarkan

A dan dibayar kepada ejen hartanah berlesen yang dilantik iaitu Tetuan Jeffrey Brandon Property E(3) 1783 yang beralamat di No. 22 Jalan SS 22/7, Damansara Jaya, 47400 Petaling Jaya, Selangor (selepas ini disebut sebagai "Ejen Hartanah tersebut") dimana Ejen Hartanah tersebut dan/atau kontraktornya akan meneruskan dengan Kerja-kerja Pembaikan dan Penyelenggaraan B tersebut apabila Pemohon sudah menerima keseluruhan Harga jual tersebut menurut terma-terma Perjanjian Jual Beli vana ditandatangani oleh Pemohon dan bakal pembeli.

[41] Since the impugned order was obtained by way of an *ex parte* application, it may be set aside pursuant to O. 32 r. 6 Rules of Court 2012. C The court's power to set aside *ex parte* orders is necessary because often times, applicants abuse the court process by filing *ex parte* applications and mislead the court into granting orders that would not have been made if the other parties had been heard. Order 32 r. 6 simply states:

D The Court may set aside an order made *ex parte.*

[42] I find that O. 42 r. 13 Rules of Court 2012 is inapplicable here to limit the time for the applicants to apply to set aside the impugned order because it was never served on the applicants. Upon conducting a file search, the applicants' solicitors had lost no time in seeing to the applicants filing this E action to protect their interest. For convenient reference, I set out the wording of O. 42 r. 13, as follows:

Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained F the order or judgment within thirty days after the receipt of the order or judgment by him.

[43] Suriyadi FCJ (as he then was) writing for the Federal Court in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 717; [2016] 2 MLJ 457 made it abundantly clear that an *ex parte* order G may be set aside pursuant to O. 32 r. 6 or under the inherent jurisdiction of the court. His Lordship (as he then was) opined as follows:

Jurisdictionally, a court under O. 32 r. 6 of the RHC or under O. 92 of the RHC, may set aside any *ex parte* order. In *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445 at pp 446-447, VC H George J held that the court could even set aside an *ex parte* final order pursuant to O. 32 r. 6 of the RHC. This provision has general application to general applications and proceedings in chambers, and unless there were specific rules elsewhere that do away with the said rules of general application, it was applicable in an *ex parte* garnishment proceedings. In fact I VC George J had no hesitation in holding that even if O. 32 r. 6 were inapplicable the court still was equipped with inherent jurisdiction to prevent injustice.

[44] In *PECD Bhd & Anor v. AmTrustee Bhd & Other Appeals* [2010] 1 CLJ 940; [2010] 5 MLJ 357, the Court of Appeal decided that failure to make full and frank disclosure in an *ex parte* application is sufficient grounds for the *ex parte* order to be set aside. It was held as follows:

> [27] I am in agreement with decision of the learned judge on this issue. What transpired in the first OS at the High Court, and the decision of the Court of Appeal in respect of the appeal therefrom, were certainly material facts which should have been disclosed by the appellants in applying for the *ex parte* order in the second OS. ... The failure to make such full and frank disclosure renders the *ex parte* order obtained liable, and rightly, set aside.

[45] Applying the *ratio* of *Malaysian International Trading Corp Sdn Bhd* (*supra*) and *PECD Bhd* (*supra*) to this court's finding that the respondent, through its employees, was acting in breach of its fiduciary duties in its conduct of the 57 condos which are trust properties and attempting to use the impugned order to ratify its breaches, it is clear that the impugned order (and its amended version too) ought to be set aside.

[46] The above authorities are sufficient to justify setting aside the impugned order as it is an *ex parte* order. For completeness, I am of the view that had it been an order obtained after an *inter parte* hearing – without full disclosure of the scheme of paying a large percentage of sale price to the property agent as "upgrade and renovation costs" – it would also be legally justified to set it aside. There are two authorities relevant to this additional point.

[47] 80 years ago, in *Cheah Wong Nyan And Cheah Sin Kee v. Kalrm Palaniappa & Ors* [1935] 1 MLJ 31, Whitley J had occasion to consider and decided that the court has the jurisdiction to set aside a judgment obtained by fraud. The learned judge held that the proper remedy is to bring a fresh action and not to seek a rehearing. His Lordship found in favour of the beneficiaries who applied to set aside the impugned judgment. The relevant parts of his judgment are as follows:

> The Court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a rehearing.
>
> ... One of the earliest pronouncements of this principle was made by Lord Coke in the *Duchess of Kingston*'s Case (1776) 2 Sm LC 12th Edition at page 762 where he observed that acts of the highest judicial authority though not to be impeached from within yet are impeachable from without for although it is not permitted to show that the court was mistaken it may be shown that they were misled. "Fraud is an intrinsic collateral act which vitiates the most solemn proceedings of courts of justice. It avoids all judicial acts, ecclesiastical or temporal."

A ... In the present case I am satisfied that the judgment was obtained by collusion between the parties, by a fraud on the Court in concealing the true position of affairs and by secrecy in obtaining the judgment behind the backs of those whom the parties knew to be vitally interested namely the beneficiaries.

B **[48]** The now 80 years old judgment of Whitley J in *Cheah Lean Guan (A bankrupt) v. Kalrm Palaniappa* (*supra*) was affirmed 71 years later by the Federal court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 3 MLJ 1 where it was reiterated that a judgment obtained by fraud may be impeached and set aside in a fresh action. It was held as follows:

C

The respondents' action in the present case is to impeach or set aside the earlier judgment which was obtained by the appellant against the respondents at the Kuantan High Court on 25 July 2007 on the ground of fraud and/or perjury committed by the appellant's witness during that earlier trial. The claim is by way of a fresh action based on fresh evidence

D which could not have been obtained at the earlier trial.

The law recognises this type of cause of action. Section 44 of the Act provides that 'Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not

E competent to deliver it or was obtained by fraud or collusion'. This provision is an exception to the doctrine of *res judicata* as provided for under s. 40 of the same Act.

The impeachment action must be by way a fresh action, not in the same action where the impugned earlier judgment was made. As early as 1935,

F Whitley J in the Penang High Court case of *Cheah Wong Nyan and Cheah Sin Kee v. KALRM Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt* [1935] 1 MLJ 31, relying on English authorities of *Cole v. Langford* [1898] 2 QB 36; *Priestman v. Thomas* [1884] 9 PD 270; *Duches of Kingston's Case 2 Smith LC* (13th Ed) 644 and *Patch v. Ward* [1867] LR 3 Ch App 203 ruled that, 'The court undoubtedly has

G jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing'.

[49] Based on this court's above finding of facts that the respondent had planned from the outset to appoint the property agent as the sole agent and

H to pay him more than RM7.6 million out of the sale price purportedly as "upgrade and renovation costs", I find that the applicants have also satisfied the legal requirements for the setting aside of an *inter parte* order on the ground of intention to defraud and deplete the trust assets – as evidenced by the contents of the impugned order (see para. 40 above) and the contents of

I annexure A of the property agent's letter (see paras. 33 & 36 above) which was unequivocally agreed by the respondent. The "upgrade and renovation costs" scheme was a sham.

[50] Lastly, whilst it is true that cl. 7.3 of the deed of trust does mention that the trustee is empowered to sell trust properties, it is not an unfettered power. Clause 7.3 must be read with trite law that a trustee is a fiduciary who must always act in the best interest of the beneficiaries. As the finding of facts made above have shown that the respondent had acted with serious lack of probity, it is not open to the respondent – which is a trust company appointed by the court to be trustee of the trust – to callously point its finger at cl. 7.3 and claim to have unfettered power to sell trust properties at a great loss to the beneficiaries of the trust.

Conclusion

[51] Based on the finding of facts stated above, there are in fact sufficient grounds for the applicants to seek an order to remove the respondent as trustee of the trust. However, since it is not specifically prayed for, this court would not resort to the omnibus prayer to issue such an order. The applicants' prayer for the setting aside of the impugned order dated 20 June 2023 in OS No. 1904 is allowed. Logically, it follows that its amended version is set aside too.

[52] Lastly, consequential orders are necessary since the sham "upgrade and renovation costs" scheme has proven that the respondent could not be trusted to sell the 57 condos by way of private treaty or through any property agent. The way forward is for this court to order that any sale of the 57 condos must be conducted by way of public auction or open tender at market price, under the supervision of solicitors and a property valuer with the assistance of licensed estate agents to market those properties; to ensure transparency and the best sale price is obtained for the benefit of the beneficiaries. A final note: in the applicants' prayer in the originating summons, "estate agent" was erroneously translated as "ejen harta pusaka" when it should be "ejen harta tanah". This error is inconsequential and may be corrected under the slip rule in O. 20 r. 11 Rules of Court 2012.